

- SUBJECT:** Witness tampering in family violence cases; forfeiture by wrongdoing
- COMMITTEE:** Criminal Jurisprudence — committee substitute recommended
- VOTE:** 8 ayes — Herrero, Carter, Burnam, Canales, Hughes, Leach, Moody, Toth
0 nays
1 present, not voting — Schaefer
- WITNESSES:** For — Jo Anne Estrada, The Women's Shelter of South Texas; Staley Heatly, 46th District Attorney's Office; Aaron Setliff, The Texas Council on Family Violence; (*Registered, but did not testify:* Victoria Camp, Texas Association Against Sexual Assault; John Dodson, Uvalde County Attorney; Steven Tays, Bexar County Criminal District Attorney's Office; Jennifer Tharp, Comal County Criminal District Attorney)

Against — None
- BACKGROUND:** Penal Code sec. 36.05 makes tampering with a witness a crime. The offense includes coercing a witness or prospective witness to:
- testify falsely;
 - withhold testimony;
 - elude legal process summoning to testimony or supply evidence;
 - be absent from an official proceeding to which the witness was summoned; and
 - abstain from, discontinue, or delay the prosecution of another.
- These offenses are third-degree felonies, unless it is an official proceeding that is part of the prosecution of a crime, in which case it is the same category as the most serious offense charged in the case.
- DIGEST:** **Witness tampering in family violence cases.** CSHB 3060 would increase penalties for witness tampering if the underlying offense involved family violence. In these cases, the penalty for witness tampering would be the greater of a third-degree felony or the most serious offense in the criminal case. For second offenses the penalty would be increased to the greater of a second-degree felony or the most serious offense in the case.

A person would be considered to have coerced a witness or prospective witness if the person committed an act of family violence perpetrated, in part, with the intent to cause the witness' unavailability or failure to comply and the tampering involved an underlying offense related to family violence.

The bill would establish a rule for evidence in cases of witness tampering involving family violence. The rule would apply to cases if the underlying offense involved family violence or the defendant was alleged to have committed witness tampering by committing an act of family violence against a witness or prospective witness. In prosecuting these cases, subject to the Texas Rules of Evidence and other applicable laws, parties could offer testimony or evidence of all relevant facts and circumstances that would assist the court in determining whether someone coerced a witness or prospective witness, including the nature of a relationship involving the witness.

Forfeiture by wrongdoing. CSHB 3060 would establish "forfeiture by wrongdoing." This would occur if a party to a criminal case wrongfully procured the unavailability of a witness or prospective witness. In these cases, persons could not benefit from the wrongdoing by depriving the court of relevant evidence and testimony and would forfeit their right to object to the admissibility of evidence or statements based on the unavailability of the witness.

Evidence and statements related to a person who had engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of a witness or prospective witness would be admissible and could be used to make a showing of forfeiture by wrongdoing. When deciding whether this type of evidence was admissible, courts would have to determine, out of the jury's presence, whether forfeiture by wrongdoing occurred by a preponderance of the evidence.

Parties offering the evidence or statements would not be required to show that:

- the sole intent was to wrongfully cause the witnesses' unavailability;
- the actions constituted a criminal offense; or
- any statements offered were reliable.

Convictions for tampering with a witness or the offense of obstruction or retaliation would create a presumption of forfeiture by wrongdoing.

Rule 403, Texas Rules of Evidence, would apply to provisions on forfeiture by wrongdoing. The article would not permit the presentation of character evidence that would otherwise be inadmissible under the Texas Rules of Evidence or other law.

The bill would take effect September 1, 2013, and would apply to offenses committed on or after that date.

**SUPPORTERS
SAY:**

CSHB 3060 is needed to address the serious problem of witness tampering in family violence cases. Increasing penalties for this crime and instituting "forfeiture by wrongdoing" would be appropriate given that witness tampering is used by family violence perpetrators to sabotage the court system and silence victims. CSHB 3060 would be an important component of Texas' efforts to combat family violence crimes and to protect victims from this kind of terror.

Witness tampering is prevalent in family violence cases in which offenders coerce or outright force victims to refrain from testifying in court. For example, in one case a mother of four was choked and told if she testified against the batterer in the trial, he would finish the job. In another case a mother of two was beaten and then threatened with deportation and with sending her children to foster care if she testified.

CSHB 3060 would address this problem by increasing penalties for witness tampering in family violence cases so that it would be the greater of a third-degree felony or the penalty for the most serious offense charged. Currently, the penalty could be lower than a third-degree felony if the most serious offense charged was lower.

Due to the seriousness of witness tampering in family violence cases, a third-degree felony or higher for repeat offenses, is warranted even if the underlying offense carries a lesser penalty. These penalties would make the crime of witness tampering in family violence cases better fit the offense, keep offenders incarcerated longer to protect victims and could deter offenses.

Instituting "forfeiture by wrongdoing" would ensure that family violence offenders who tamper with witnesses would not benefit from these

actions.

It would be important that CSHB 3060 allow statements that otherwise would be inadmissible as evidence to be admitted, and this exception to general practice would be warranted. Courts would need to get an accurate picture of a situation to make a decision about whether something fell under forfeiture by wrongdoing. In gathering this information, courts would be investigating the tampering, not the original offense. In some cases, the person who might verify the statements would be the one who was tampered with.

The U.S. Supreme Court has upheld this doctrine and numerous states use it. Codifying the doctrine would make this tool available to all Texas prosecutors.

**OPPONENTS
SAY:**

Current law adequately punishes witness tampering by making it a third-degree felony or the most serious offense charged. This structure keeps the proper relationship between the offense itself and tampering related to the case. Under HB 3060, a person charged with a class A misdemeanor could end up being charged with a third-degree felony for the tampering. This could be inappropriate in some cases.

The procedure established by CSHB 3060 for admitting evidence under forfeiture by wrongdoing would be too broad. Under the bill, the proponent of the evidence would not have to prove that the accused's sole intent was to cause the witness' unavailability, that the action constituted a criminal offense, or that the statements were reliable. This could open the door to hearsay admissibility in some cases.